Supreme Court, U.S.
FILED

No. 04-1727 JUN 21 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD D. COHEN,

Petitioner,

v.

WORLD OMNI FINANCIAL CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The Circuit Court Of The Fifteenth Judicial Circuit In And For Palm Beach County, Florida

PETITION FOR A WRIT OF CERTIORARI

RICHARD D. COHEN
21870 Cartagena Dr.
Boca Raton, Florida 33428
(561) 883-6227
Counsel of Record for Petitioner

QUESTION PRESENTED

Whether a state's refusal to grant a tax credit against its use tax for a sales tax previously paid to another state on the same value or activity violates the dormant Commerce Clause of the United States Constitution; and if so, whether the type of transaction, *e.g.*, sale, lease, etc., involved is constitutionally irrelevant to this question.

PARTIES TO THE PROCEEDING

Petitioner, who was the defendant below, is Richard D. Cohen, of Boca Raton, Florida.

Respondent, who was the plaintiff below, is World Omni Financial Corp., of Deerfield Beach, Florida.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12
I. THIS CASE SQUARELY PRESENTS AN ISSUE THAT THE COURT PREVIOUSLY FOUND TO BE CERTWORTHY	12
II. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE, GOING TO THE HEART OF THE INTERESTS PROTECTED BY THE COMMERCE CLAUSE	13
III. THE DECISION BELOW COMPLETELY IGNORES THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE	18
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 13

American Trucking Ass'ns v. USF Holland, Case No. 03-1230 13

Barringer v. Griffes, 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 510 U.S. 107 (1994) 10, 20

Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 13, 22

Chambers v. Mississippi, 410 U.S. 284 (1973) 13

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 8, 18

Container Corp. v. Franchise Tax Board, 463 U.S. 159 (1983) 8

Dep't of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994) 10

General Motors v. Tracy, 519 U.S. 278 (1997) 13, 22

Gomez v. United States, 490 U.S. 858 (1989) 22

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 3, 12

Hillside Diary, Inc. v. Lyons, 539 U.S. 59 (2003) 13

In the Matter of the Petition of Sandra Ann Torquato, 2000 N.Y. Tax LEXIS 283 (2000) 14

Intel Containers Int'l v. Huddleston, 507 U.S. 60 (1993) 5

New York ex. rel. Bryant v.Zimmerman, 278 U.S. 63 (1928) 13

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 12

TABLE OF AUTHORITIES

Page

Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995) ..... *passim*

Street v. New York, 394 U.S. 576 (1969) 13

Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987) 19, 20

Williams v. Vermont, 472 U.S. 14 (1985) 12

CONSTITUTIONAL PROVISIONS

Fla. Const. art. V, §3(b)(3) 11

U.S. Const. art. I, §8, cl. 3 ..... *passim*

STATUTES AND REGULATIONS

28 U.S.C. §1257(a) 1

28 U.S.C. §2101(c) 1

Fla. Stat §212.06(2)(e) 5

Fla. Stat. §212.06(7) 2, 8, 10, 21, 23

Fla. Stat. §212.06(8)(a) 2, 8, 22, 23

Fla. Stat. §212.07(1)(a) 5

Fla. Stat. §212.07(2) 7

N.Y. Tax Law §1111(i) 2, 6

20 NYCRR §527.15 ..... 5, 6

TREATISES

Jerome R. Hellerstein and Walter Hellerstein, *State and Local Taxation* 637-638 (4th ed. 1978) 12

TABLE OF AUTHORITIES

Page

Jerome R. Hellerstein and Walter Hellerstein, *State Taxation* ¶18.08[2] (3rd ed. 2003) 12

OTHER PUBLICATIONS

CNW Marketing/Research, *Consumer New Vehicle Leasing, Lease Share: of Retail, 1990-2004* 16

Federal Reserve Bank of St. Louis, *GDP Data* (http://research/stlouisfed.org/fred2/series/GDP/18)..... 17

Florida Dep't of Revenue, *2003-04 Annual Report* 17

National Automobile Dealers Association, Industry Analysis Division, *Relationship of new-car dealerships to total retail trade in 2003, by state*..... 17

Office of Economic and Demographic Research, Florida Legislature, *Florida Demographic Summary* (2005) (http://www.state.fl.us/edr/population/popsummary.pdf)..... 18

RIA All States Tax Guide ¶256 4

U.S. Census Bureau, *People QuickFacts* (2003) (http://quickfacts.census.gov/qfd/states/00000.html)..... 16

U.S. Census Bureau, *State-to-State Migration Flows: 1995-2000* (2003) (http://www.census.gov/prod/2003pubs/censr-8.pdf) 15

U.S. Dep't of Transportation, Federal Highway Administration, *Average Number of Vehicles and Vehicle Travel Per Household* (2001)..... 16

OPINIONS BELOW

The decision of Appellate Division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, for which review is being sought is unreported and reproduced in the Appendix at App. 1. The decision of the County Court in and for Palm Beach County, Florida, granting summary judgment dismissing petitioner's counterclaims is also unreported and reproduced in the Appendix at App. 2. The decision of the County Court in and for Palm Beach County, Florida, granting summary judgment on respondent's complaint is also unreported and reproduced in the Appendix at App. 3.

JURISDICTION

The judgment of the Appellate Division of the Circuit Court of the Fifteenth Judicial District in and for Palm Beach County, Florida, was entered on August 2, 2004. A timely motion for rehearing thereof was denied on August 31, 2004 (App. 4).

On September 29, 2004, petitioner filed a timely petition for a writ of certiorari with the District Court of Appeal of the State of Florida, Fourth District, which was denied on February 15, 2005 (App. 5). A timely motion for rehearing thereof was denied on March 29, 2005 (App. 6). The present petition is timely filed under 28 U.S.C. §2101(c) and under Rules 13.1 and 13.3 of this Court.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., art. I, §8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes."

New York Tax Law §1111(i) provides, in pertinent part, that "all receipts due or consideration given or contracted to be given for such property under and for the entire period of such lease . . . shall be deemed to have been paid or given and shall be subject to tax, and any such tax shall be collected, as of the date of first payment under such lease . . . or the date of registration of such property with the commissioner of motor vehicles, whichever is earlier."

§212.06(7), Fla. Stat., provides, in pertinent part, that "the provisions of this chapter [imposing sales and use tax] do not apply in respect to the use or consumption of tangible personal property . . . for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia."

§212.06(8)(a), Fla. Stat., provides, in pertinent part, that "use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use . . . in this state; provided, however, that . . . it shall be presumed that tangible personal property used in another state, territory of the United States, or the District of Columbia for 6 months or longer before being imported into this state was not purchased for use in this

state. The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside the state."

STATEMENT OF THE CASE

The facts of this case are undisputed,[1] and are typical of millions of other individuals throughout the nation who lease their cars in one state, prepay the required sales tax for the full lease term to that state, then move to another state which imposes its own use tax upon them without credit for the sales tax previously paid to the first state, and are thus subjected to cumulative – and discriminatory – sales and use tax burdens.

At issue in this case is whether a state's denial of tax credit against its use tax for the sales tax previously paid to another state on the same value or activity violates the dormant Commerce Clause of the United States Constitution.[2] The Court has been flirting with this question for nearly seventy years.[3] Although the Court has answered the question in the affirmative in dicta and implicitly through the application of its internal consistency doctrine, it has never explicitly done so. To be sure, every one

[1] The first court below expressly found that "there is no genuine issue as to any material fact" (App. 3a).

[2] Subsumed within this main inquiry is the related, but analytically distinct, subordinate inquiry of whether the type of transaction, *e.g.*, sale, lease, etc., is constitutionally irrelevant to the main inquiry. We submit that this too should be answered in the affirmative.

[3] The Court first broached the question in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937).

of the 45 states (including Florida) and the District of Columbia[4] that impose sales and use tax statutorily provide for tax credit for sales or use taxes paid to other states.[5] This tax credit is designed to equalize the tax burden between interstate and intrastate activity thus assuring that the sale and use of property is, in principle, taxed just once whether or not the property crosses state lines. We cannot improve upon the Court's own description of this statutory credit pattern in *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175, 194 (1995):

> These credit provisions create a national system under which the first state of purchase or use imposes the tax. Thereafter, no other state taxes the transaction unless there has been no prior tax imposed . . . or if the tax rate of the prior taxing state is less, in which case the subsequent taxing state imposes a tax measured only by the differential rate (*internal quotations and citations omitted*).

Although this is how the statutory credit pattern is supposed to operate, the intended tax parity is destroyed – and discrimination against interstate commerce necessarily results – when the second state subjects leased property to its own use tax on the periodic lease payments

---

[4] Although the District of Columbia is technically not a state, this distinction is irrelevant to the issue presented. Therefore, for ease of exposition, all references to a "state" shall be deemed to also include the District of Columbia.

[5] *RIA All States Tax Guide* ¶256. Some of these credits are technically drawn as exemptions for property that previously has been subject to sales and use tax in other states. For ease of exposition, however, we shall refer to both types of provisions as "credits", in keeping with the way that such provisions are generally described by the cases and commentary.